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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1966.

No. 874

GENEVA R. MARSHALL,
Petitioner,

v.

ELVIE RUSSELL, Individually and in Her Representative Capacity as Executrix of the Estate of Q. V. Russell, Deceased, et al.,
Respondents.*

PETITION FOR A WRIT OF CERTIORARI

To the Supreme Court of the State of Georgia.

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* Other Respondents are: EVERETT RUSSELL, RUTH RUSSELL HOWARD and OLIVER O. RUSSELL.

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PETITION FOR A WRIT OF CERTIORARI

To the Supreme Court of the State of Georgia.

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of The State of Georgia entered on the 9th day of September, 1966, and in which a timely motion for rehearing was filed by Petitioner and in which a rehearing was denied by the Supreme Court of Georgia on September 22, 1966.

* Other Respondents are: EVERETT RUSSELL, RUTH RUSSELL HOWARD and OLIVER O. RUSSELL.

CITATIONS TO OPINIONS BELOW.

The opinion of the Supreme Court of Georgia is unreported as of the date of the filing of this petition for a writ of certiorari and is printed in Appendix B hereto, infra, p. 12. The opinion of the Supreme Court denying the rehearing is printed in Appendix B hereto, infra, p. 12. The opinion of the Supreme Court of Georgia is identified as Case No. 23576.

JURISDICTION.

The judgment of the Supreme Court of Georgia in the original decision was entered on September 9, 1966, and rehearing was denied on September 22, 1966. The jurisdiction of this Court is invoked under 28 U. S. C. 1257 (3).

QUESTION PRESENTED.

Whether a state requirement that a judgment obtained by perjury can be set aside only unless the person charged with perjury shall have been duly convicted and unless it shall appear that the judgment could not have been obtained and entered up without the evidence of the perjured testimony offends the due process clause of the 14th Amendment of the Federal Constitution of perjury as a condition precedent to the setting aside of a judgment obtained by perjury.

STATUTE INVOLVED.

The statutory provisions involved are Ga. Code, Section 110-706, and the Due Process and Equal Protection Clause of the Constitution of the United States. Ga. Code, Section 110-706, is printed in Appendix A, infra, p. 11.

STATEMENT.

Petitioner filed her petition in the Superior Court of Burke County, Georgia, against Respondents seeking an accounting between the parties, as heirs of Q. V. Russell, deceased, and seeking to set aside the probate of the Last Will and Testament of Q. V. Russell and declaring an intestacy as to the death and the estate of Q. V. Russell, because of the alleged obtaining of the probate of the joint Will in solemn form on the basis of perjured testimony. Petitioner alleged a lack of knowledge of the defective probate of the Will until January, 1966. Petitioner, among other grounds, alleged that the proceedings and judgment of probate obtained in solemn form be declared void as depriving Petitioner of her property without due process of law and as violating and denying to Petitioner due process of law as guaranteed by the 14th Amendment of the Constitution of the United States (Record p. 11). The defendants filed their demurrers to the petition and the trial court on May 20, 1966, sustained the demurrers and dismissed the plainiff's petition. On May 21, 1966, Petitioner filed her notice of appeal to the Supreme Court of Georgia and the same was docketed in the Supreme Court of Georgia on May 25, 1966. In the enumeration of errors in the Supreme Court (Enumeration of Error No. 5) (Record p. 62) Petitioner enumerated as error the lower court's dismissing the petition on the grounds that it did not set forth any cause of action, because the judgment of probate could not have been entered up without the evidence of witnesses to the Will and in that it did not appear that those persons alleged to have committed perjury had been duly convicted of perjury as charged against them by the allegations of Plaintiff's petition. The Federal Constitutional issue was clearly presented in the trial court by the pleadings and in the Supreme Court of Georgia by the enumeration of errors and the issues presented for decision

in the Supreme Court of Georgia in that at each stage it was alleged that the judgment of probate in solemn form was void as depriving Petitioner of her property without due process of law contrary to due process of law and violating and denying to Petitioner due process of law as guaranteed by the 14th Amendment of the Constitution of the United States for enumerated reasons.

The Supreme Court in headnote two of the decision held, "The allegations of Plaintiff's petition are insufficient to show that the judgment of probate was procured by fraud on the Court of Ordinary through perjured testimony where there is no allegation that those charged with perjury have been indicted and convicted of such offense." Further in division two of the opinion (Record p. 75, App. B., p. 12) the Supreme Court said, ". . . Though a judgment obtained as a consequence of corrupt and wilful perjury may be set aside, before it can be done, it must be shown that the person charged with such perjury has been convicted thereof. Ga. Code, § 110-706.

The trial court, in dealing with Petitioner's petition to protect her interest in the estate of her father, Q. V. Russell, deceased, sustained the demurrers of Respondents notwithstanding the allegations of the petition as to facts and circumstances which, if proved, would show conclusively that the judgment of probate in solemn form of the joint Will of Petitioner's father was null and void. The petition alleged facts that would show a course of conduct from the death of Petitioner's father such as to deprive Petitioner of her property and rights as an heir of her father. The petition alleged the discovery of the evidence that would prove that the probate in solemn form was void and which, if proved, would result in Petitioner's right and interest in the estate of her father being protected. As the case now stands, and unless certiorari is granted by this Court, this Petitioner will be deprived of her right and of her property because of the applica-

tion of Ga. Code, § 110-706, which requires that before a judgment can be set aside on the grounds that it was obtained by perjury that it must be shown that the person charged with such perjury has been convicted thereof.

The decision of the Supreme Court of Georgia was entered on September 9, 1966, and a timely motion for rehearing was filed by your Petitioner and one of the grounds enumerated in the petition for rehearing was that the judgment of probate in solemn form was void as depriving the Plaintiff of her property without due process of law and as violating and denying to Petitioner due process of law as guaranteed by the 14th Amendment to the Constitution of the United States.

The Federal question as to the rights protected under the 14th Amendment of the Constitution of the United States clearly appear in the petition, in the Appeal to the Supreme Court of Georgia; in the decision of the Supreme Court of Georgia; and in the Motion for Rehearing.

Rehearing was denied by the Supreme Court of Georgia on September 22, 1966, and Petitioner now seeks the writ of certiorari to review the decisions of the Supreme Court of Georgia.

REASONS FOR GRANTING THE WRIT.

The decision of the Supreme Court of Georgia below applying Ga. Code, § 110-706, denies Petitioner of her property in that the Ga. Code, § 110-706, as applied, denies to this Petitioner her property without due process of law in that said Code Section, as applied, requiring that the judgment obtained by perjury cannot be set aside unless the person charged with the perjury shall have been convicted. The Georgia Code Section, while purporting to grant authority for the setting aside of a judgment obtained on perjured testimony, imposes a condition

of setting aside the judgment that is impossible and unreasonable and arbitrary.

The Supreme Court of Georgia in the case of **Burke v. The State**, 205 Ga. Reports, 656, 659, recognized the decisions of this Court in **Mooney v. Holohan**, 294 U. S. 103 (55 Supreme Court 340, 79 Lawyers Edition 791, 98 A. L. R. 406); **Pyle v. Kansas**, 317 U. S. 213 (63 Supreme Court 177, 8887 Lawyers Edition 214); **New York ex rel. Whitman v. Wilson**, 318 U. S. 688 (63 Supreme Court 840, 87 Lawyers Edition 1083); and **White v. Ragen**, 324 U. S. 760 (65 Supreme Court 978, 89 Lawyers Edition 1348), that where it is shown that a conviction was procurred by perjured testimony, with testimony known to be perjured at the time, there was a denial of due process as guaranteed by the 14th Amendment. On several occasions the question of reviewing a conviction of a person convicted with perjured testimony has been before the Supreme Court of Georgia, but in each instance that Court has consistently held that a judgment obtained by perjury could be set aside on such grounds only unless the person charged with perjury had been convicted and further added the requirement of the Code Section that it must be shown that the judgment could not have been obtained except by the testimony of the perjured person. The Georgia Supreme Court has on many occasions wrestled with the application of the requirement of the conviction for perjury and has recognized the burden that is placed upon a person seeking to satisfy the judgment obtained by perjury. This requirement, on its face, of the conviction of a person giving the perjured testimony, places such a burden upon the person affected by the judgment that it is impossible, unreasonable and contrary to the every concept of the due process of law.

The difficulty of convicting a person of perjury after the lapse of several years is most difficult, if not impossible. In the case sub judice, the judgment of probate was ob-

tained at a time when all of the heirs were in agreement and the petition shows on its fact that a course of conduct was followed treating all of the heirs as equal participants in the estate of the father and husband. The petition alleges that the perjury in obtaining the judgment was not known until January of 1966 and the record shows that Petitioner filed her petition within a very short time after the discovery of the perjury. The demurrer raised the question that an attack on the judgment of probate was too late in that the probate had occurred more than three years after the date of the alleged void judgment and that notwithstanding the perjury, that it could not be attacked for the reason that the petition did not allege the conviction of the alleged perjurers as required by the Ga. Code, § 110-706.

That judgments obtained by perjury should not be allowed to stand goes without question. The object of all legal investigation being to ascertain the truth, there is no reason, under any theory of law, to deny a person property or rights under our Constitution because that person is unable to or has not procured the conviction of another person for a crime. To impose such a restriction is to impose upon a citizen a requirement that he not only show a right but in addition thereto must show that he has taken upon himself or caused to be prosecuted in a separate proceeding and in a proceeding in which, at most, he could be a prosecutor, and require the force of the State, in obtaining a conviction for perjury. The rules of evidence applicable in a perjury proceeding are different in that in such a proceeding it would be necessary for a citizen to prove beyond a reasonable doubt the perjury of another person that the citizen would not of necessity have any knowledge of. Even then, a jury of twelve could, for any reason that they desire, find the person charged with perjury innocent, notwithstanding the evidence produced by the citizen claiming a right con-

ditioned upon the conviction of another for a crime. To state the proposition shows the impossibility of accomplishing a conviction and complying with the requirements of the Georgia Code Section for the purpose of obtaining a right that is placed in jeopardy by a judgment obtained by perjury.

Too, the question presented is of importance not only to the Petitioner in this case but is important to every person asserting a right as a citizen. The reasoning is applicable not only in Civil cases but in criminal cases as well in that the Georgia Code Section applies equally to civil and criminal proceedings. It is interesting to note that in the cases adjudicated by the appellate courts of Georgia under Code § 110-706, that while the right to set aside a judgment obtained by perjury has been clearly recognized, that a careful search has failed to disclose any judgment that has been set aside. Clearly the rights of the citizen should not be predicated upon nor conditioned upon his conviction or causing the conviction of another person for a crime.

That the use of false testimony to obtain a judgment is prohibited is set forth in **Napue v. Illinois**, 360 U. S. 264 (3 Lawyers Edition 2, 1217, 79 Supreme Court 1173). While dealing with a criminal case, the reasoning is applicable in a civil proceeding in that due process is guaranteed in both criminal and civil proceedings. In this case the Petitioner was denied the right to even present her evidence as to the fact that the judgment of probate was obtained by perjured testimony in that applying Georgia Code, § 110-706 the Court ruled that the petition should be dismissed on demurrer notwithstanding the allegations therein of the obtaining of the judgment by perjury. Petitioner was denied the right to prove her allegations of perjury and to prove and assert her right in a Court of law as set forth in her sworn petition in equity. That petitioner should have the right to prove her alle-

gations under the due process clause of the 14th Amendment Petitioner and was at least entitled to have her day in Court to prove her allegations of perjury was recognized in **Smith v. United States,** 259 Federal 2nd 125.

Under the record of this case, where the Petitioner alleges that the relief prayed for should be granted for the reasons:

a) The Will was a joint Will that was not executed in compliance with legal requirements;

b) The Will was not properly witnessed;

c) No evidence to support judgment of probate;

d) Affidavits recited to support probate not valid as no oath administered;

e) Judgment of probate obtained by fraud with knowledge of attorney for propounder that probate was obtained contrary to law;

f) Knowledge of truth surrounding probate of Will not discovered until after statute of limitations had expired;

g) Petitioner cannot convict perjurers in that statute of limitations had expired upon discovery of truth by Petitioner;

h) Petitioner denied due process of law in proving her right to prove her allegations as alleged

it is submitted that the writ of certiorari should be granted to protect the rights of Petitioner.

It is basic that a person is entitled to at least have an opportunity to prove the allegations where such allegations, if supported, would support and authorize and protect a right of the citizen protected by the 14th Amendment.

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

This 30th day of November, 1966.

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